

Message Text

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ACTION EUR-12

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PASS TREASURY

E.O. 11652: N/A
TAGS: EFIN, ECON, OECD
SUBJECT: EXEMPTION FOR SPECIAL CUSTOMS OR MONETARY
SYSTEMS FROM NON-DISCRIMINATION OBLIGATION
OF OECD CODES OF LIBERALIZATIONS

REF: (A) STATE 158363 (1976), (B) OECD PARIS 36277
(1976), (C) DAF/INV/76.23 AND ADDENDA 1-5,
(D) DAF/INV/76.42, (E) DAF/INV/72/54,
(F) OECD PARIS 3851

1. BEGIN SUMMARY. WORKING GROUP OF INVISIBLES COMMIT-
TEE (IC) CONSIDERED LONG-STANDING QUESTION OF SCOPE
PERMITTED FOR DISCRIMINATORY LIBERALIZATION OF INVISIBLE
OPERATIONS AND CAPITAL MOVEMENT BY "SPECIAL SYSTEMS"
(I.E., ESSENTIALLY EC). DEBATE WAS USEFUL OCCASION TO
CLARIFY AREAS OF DISAGREEMENT, BUT UNFORTUNATELY INDI-
CATED LITTLE SYMPATHY FOR US POSITION THAT SCOPE FOR
DISCRIMINATION IS STRICTLY LIMITED. IC WILL CONSIDER
SUBJECT FURTHER AT PLENARY SESSION LATER THIS YEAR ON
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BASIS OF NOTE TO BE DONE BY OECD LEGAL SERVICE.
ACTION REQUESTED: GUIDANCE AS INDICATED IN PARAGRAPH 9.
END SUMMARY.

2. WG MET JANUARY 31 PRIOR TO IC PLENARY SESSION
FEBRUARY 1 AND 2 TO DISCUSS QUESTION OF INTERPRETATION
OF ARTICLES 9 AND 10 (AND OTHER RELEVANT PROVISIONS) OF

OECD CODE OF LIBERALIZATION OF CURRENT INVISIBLE OPERATIONS AND CODE OF LIBERALIZATION OF CAPITAL MOVEMENTS (CMC). (NOTE: ARTICLES OF RESPECTIVE CODES ARE VIRTUALLY IDENTICAL, BUT THIS MESSAGE IS KEYED TO CMC.) MOST IC MEMBERS ATTENDED, BUT ONLY BELGIAN, FRENCH, SWISS, UK AND US MEMBERS ACTIVELY PARTICIPATED IN DISCUSSION ORGANIZED BY OECD LEGAL SERVICE (STEIN). MEETING CHAIRED BY SECRETARIAT (BERTRAND) AS IC FRENCH CHAIRMAN WISHED TO TAKE PART IN THE FRAY. WHILE DISCUSSION OF SPECIAL SYSTEMS WAS IN GENERAL TERMS, IT WAS CLEARLY TARGETTED AT EC (EC OBSERVERS, INCLUDING LEGAL EXPERT FROM BRUSSELS, DID NOT PARTICIPATE ACTIVELY).

3. STEIN SUMMARIZED POSITIONS OF SIX IC MEMBERS WHO HAVE SUBMITTED NOTES (REF C), POINTING OUT THAT ONLY US MEMBER BELIEVED SCOPE FOR DISCRIMINATION TO BE LIMITED TO OPERATIONS OUTSIDE ITEMS LISTED IN ANNEX A. (IC MEMBERS WHO HAD NOT SUBMITTED WRITTEN NOTES ALSO DID NOT SUPPORT US VIEW.) WHILE US MEMBER AGREED (PARA 4, REF A) THAT CASE COULD ALSO BE MADE FOR INTERPRETING ARTICLE 10 SO AS TO PERMIT DISCRIMINATORY LIBERALIZATION ON ANNEX A ITEMS, HE DID NOT CONCEDE THE POINT.

4. UNFORTUNATELY, THERE WAS RELATIVELY LITTLE--AND WEAKENING--SUPPORT FOR US MEMBER'S VIEW THAT ARTICLE 10, WHILE AMBIGUOUS REGARDING SCOPE FOR DISCRIMINATION IN LIBERALIZING, UNEQUIVOCALLY PROHIBITS DISCRIMINATORY DELIBERALIZATION (I.E., INSTITUTING OR INTENSIFYING RESTRICTIONS AGAINST NON-EC MEMBERS) OF ANNEX A OPERALIMITED OFFICIAL USE

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TIONS. (NOTE: IN THE CASE OF CAPITAL MOVEMENTS, OPERATIONS CAN BE RESTRICTED AT ANY TIME IN CASE OF LIST B ITEMS, BUT RESTRICTION OF LIST A ITEMS (OR ANY OPERATIONS IN CASE OF THE INVISIBLES CODE) REQUIRES A DEROGATION UNDER ARTICLE 7.)

5. AS DISCUSSION PROGRESSED ON DELIBERALIZATION OF LIST B ITEMS, OTHER MEMBERS TENDED TO BECOME INCREASINGLY PERSUADED THAT DISCRIMINATION IS LEGALLY PERMITTED. BASIC ARGUMENT BEGINS WITH PREMISE THAT COUNTRY MEETING CRITERIA OF ARTICLE 10, I.E., EC MEMBER, COULD RESTRICT OPERATIONS IN NON-DISCRIMINATORY MANNER VIS-A-VIS ALL CODE MEMBERS AND THEN RE-LIBERALIZE VIS-A-VIS EC ONLY (RELIBERALIZATION BEING CONSIDERED NO DIFFERENT FROM INITIAL LIBERALIZATION). FOLLOWING THIS LINE OF THOUGHT IT THEN BECOMES UNNECESSARY TO FOLLOW SUCH CIRCUITOUS ROUTE AND COUNTRY COULD MOVE DIRECTLY TO DISCRIMINATORY RESTRICTIONS. IT WAS ALSO RECALLED

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THAT LIST B WAS ADDED TO ANNEX A AFTER ADOPTION OF CMC
AND THAT ARTICLE 10 WAS NOT WRITTEN WITH THE POSSIBILITY
IN MIND OF A "SECOND PRIORITY" CLASS OF CAPITAL MOVE-
MENTS TO BE LIBERALIZED. THE MOST TELLING ARGUMENT ON
WAVERING MEMBERS, HOWEVER, WAS CONTENTION THAT COUNTRIES
BELONGING TO SPECIAL SYSTEMS WOULD BE MORE RELUCTANT
TO LIBERALIZE LIST B ITEMS IF POSSIBILITY OF SUBSEQUENT
DISCRIMINATORY DELIBERALIZATION WERE EXCLUDED.

6. THIS VIEW, PUT FORTH IN TERMS OF FLAG-WRAPPED CON-
TENTION THAT GOAL OF LIBERALIZATION TAKES PRECEDENCE
OVER THAT OF NON-DISCRIMINATION, EVEN CARRIED OVER SOME-
WHAT WITH RESPECT TO DELIBERALIZATION OF LIST A OPERA-
TIONS ALTHOUGH ARTICLE 7(E) SEEMS UNDENIABLY TO PROHIBIT
DISCRIMINATION IN THE CONTEXT OF DEROGATING FROM LIBER-
ALIZATION OBLIGATIONS--SEE IN PARTICULAR ARGUMENT OF
FRENCH MEMBER IN REF C, ADDENDUM 4. SOME MEMBERS
PERCEIVED SUBSTANTIVE DIFFERENCE BETWEEN ARTICLE 9
LANGUAGE ("SHALL NOT DISCRIMINATE") AND THAT OF ARTICLE
7(C) ("SHALL AVOID ANY DISCRIMINATION"), ARGUING THAT
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THE LATTER IS A WEAKER OBLIGATION. (COMMENT: WE ARE STRUCK BY READINESS OF SOME MEMBERS TO MINIMIZE NON-DISCRIMINATION OBLIGATION ON BASIS OF STRICT CONSTRUCTIONIST INTERPRETATION OF TEXT, WHICH FREQUENTLY INVOLVES EXTREMELY TORTUOUS ARGUMENTS, WHILE SIMULTANEOUSLY CITING BROAD SPIRIT AND INTENT OF THE CODES TO JUSTIFY THAT LIBERALIZATION IS ALWAYS BETTER THAN NON-DISCRIMINATION.)

7. IN REBUTTAL, US MEMBER ARGUED THAT LIBERALIZATION AND NON-DISCRIMINATION ARE BOTH GOALS, WHICH CANNOT BE JUXTAPOSED, AND THAT THE QUESTION OF WHICH GOAL TAKES PRECEDENCE IN EVENT OF CONFLICT IS AN EMPIRICAL ONE RATHER THAN ONE OF GENERAL PRINCIPLE. HE SUGGESTED THAT ARTICLE 10 PROVIDES SOME GUIDANCE--VIZ., THAT NON-DISCRIMINATION PRINCIPLE IS POTENTIALLY SUPPRESSED ONLY WHEN FORWARD MOVEMENT IS ENTAILED--AND THAT IC WOULD HAVE TO MAKE INDIVIDUAL JUDGMENTS FOR EACH SPECIFIC CASE.

8. TIME DID NOT PERMIT DISCUSSION OF "OTHER RELEVANT ARTICLES" (INCLUDING ESPECIALLY ARTICLE 4) OR OF "NON-LEGAL" QUESTION OF HOW IC SHOULD EXERCISE ITS GENERAL RIGHT TO RECOMMEND LIBERALIZATION MEASURES SO AS TO DISAPPROVE, IN ESSENCE, A DISCRIMINATORY PRACTICE WHICH HAD BEEN JUSTIFIED BY THE COUNTRY OR COUNTRIES CONCERNED UNDER ARTICLE 10. (THIS QUESTION IN PART INVOLVES INTERPRETATION OF LAST SENTENCE OF ARTICLE 10--E.G., DOES STEP LEADING TO DISCRIMINATION HAVE TO BE TAKEN BY ALL EC MEMBERS SIMULTANEOUSLY.) SEVERAL MEMBERS INDICATED THAT, WHILE THEY COULD NOT AGREE TO LEGAL INTERPRETATION WHICH STRICTLY LIMITS SCOPE FOR DISCRIMINATION, THEY COULD ENVISION REJECTING MOST DISCRIMINATORY PRACTICES--PARTICULARLY THOSE ENTAILING DELIBERALIZATION--ON THEIR MERITS IN CASE BY CASE EXAMINATION BY IC.

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9. SECRETARIAT WILL DRAFT NEW NOTE SUMMARIZING DISCUSSIONS. NEXT CONSIDERATION OF ISSUE NOT LIKELY BEFORE MAY SESSION OF IC. MISSION WOULD APPRECIATE REACTION OF WASHINGTON AGENCIES AFTER SECRETARIAT NOTE APPEARS. TURNER

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